United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

ORIGINAL

75-7457

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JAMES MORRISSEY,

Plaintiff-Appellant,

v.

NATIONAL MARITIME UNION OF AMERICA,

Defendant-Appellee.

PLAINTIFF'S REPLY BRIEF TO THE ANSWERING BRIEF OF NATIONAL MARITIME UNION OF AMERICA

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On the Subject of the LMRDA

The union in its answering brief does not even allude to the LMRDA or attempt to respond to Point I of plaintiff's brief as appellant (pp. 5-6).

The verdict for punative damages under Section 411 of Title 29 USC against the union was $50,000. This statute was not enacted until 1959 and quite obviously superseded the common law in this area.

On the Subject of Authority

The Court charged the jury (652A-653A):

> "I charge you that an employer, in this case the union, is not responsible for the act of its employees unless the act is in furtherance of the employer's business and within the scope of the employee's authority.

"An act is within the scope of an employee's authority if it is performed while he is engaged generally in the business of his employer to which he was assigned or if his act may be reasonably said to be necessary or incidental to such employment.

"The employer need not have authorized the specific act in question.

"If you find that a person within the scope of his authority and in furtherance of his employer's business either wilfully or recklessly caused injury to the plaintiff, you will find the employer responsible for such act. Even though you find the employee's act was reckless or wiiful, the employer is nonetheless responsible for the act if you find that it was performed in furtherance of the employer's business and within the scope of his authority."

This charge was correct. No objection was made.

The jury found that the officers, in posting the notice, in the name of the union, and in making the arrest, were acting within the scope of their authority as defined in the charge.

The evidence supports this finding. While the notice as drafted had not been duly promulgated, it was within the authority of the officers to post a reasonable notice. The trouble here is that the officers posted an unreasonable notice proscribing the distribution of any and all literature (except "official"). The union, through its officers, took a chance that the notice might be found unreasonable. And that is what happened. The charge submitted to the jury was the issue of whether or not the notice, as drafted, was reasonable under the circumstances (614-615A). The jury found that it was not. But this was not a finding that the posting of the notice was not within the scope of the officers' authority. The finding, in fact, was contrary.

On the Subject of Imputing Malice to the Union

If the malice of Joe Curran may not be imputed to "his" union then it must be said that no corporation or association may ever be held for malice.

Here the Court charged the jury that the union could be held for the wilful or malicious acts of its employees (653A).

And union trial counsel, far from objecting to that charge, expressly agreed (324A).

The malice of an agent, when acting within the scope of his authority may always be imputed to his principal. And this follows even though the agent may not have been expressly authorized to execute such authority in a wanton reckless or malicious manner. (3 C.J.S. 293).

On the Subject of Ratification

In its answering brief the union does not touch on the subject of ratification.

Here the union came into court claiming that there was probable cause for the arrest and that the posted notice was reasonable. The union did this in the face of the knowledge that the plaintiff claimed that the notice, the arrest and the prosecution were all malice prompted. More than that the union, officially, had its counsel assist in prosecuting the criminal charge against the plaintiff.

The union persisted in this position throughout the prosecution with full knowledge of all the evidence of malice which made up the plaintiff's case.

On the Subject of *Martin* v. *Curran*

The union, in its brief, brushes aside *Madden* v. *Atkins*, 4 N.Y. 2d 283, as "more wishful thinking on the part of plaintiff's counsel." But there it is clearly reported in 4 N.Y. 2d at page 283. Plaintiff's counsel did not "wish" it up. It was there before plaintiff's counsel needed it. Nor does the answering brief tell how the mention of the case is "mere wishful thinking."

As a matter of fact Chief Judge Field in *Madden* made it quite clear that the authority of *Martin* v. *Curran* was limited to pleading sufficiency and would not apply where proof at a trial had shown either prior authority or subsequent ratification. Here the pleadings had been conformed to the proof.

CONCLUSION

The judgment *n.o.v.* should be reversed and the jury verdicts reinstated.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Nathan Chambers, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 510 Atlantic Avenue, Brooklyn, New York.
That on January 22, 1976, he served 2 copies of Plaintiffs' Reply Brief to the Answering Brief of National Maritime Union of America on

Abraham E. Friedman, Esq.,
Attorney for Defendant-Appellee,
346 W. 17th Street
New York, New York.

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Nathan Chambers

Sworn to before me this
22nd day of January, 1976

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932360
Qualified in Nassau County
Commission Expires March 30, 1977